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IMMIGRATION LAW IN THE SUPREME COURT: THE FLAGGING SPIRIT OF THE LAW

Michael G. Heyman*

I. INTRODUCTION

Aliens usually lose in the Supreme Court. Taken alone, this is hardly surprising. For many, the Court is the last stop in a legal journey that began in removal proceedings. In prior administrative proceedings, before immigration judges, many are found deportable. Typically, this leads to appeals before the Board of Immigration Appeals,¹ the Circuit Courts of Appeal, and finally the Supreme Court.

While it is not surprising that so few aliens prevail before the Court, that view assumes that aliens have proceeded through long trails of failed proceedings. However, that is not true. Many have succeeded at one or more levels along the way. Yet, when they have gone before the Court, most have failed. They have not failed attempting to receive constitutional protection,² but as a result of the Court's interpretation regarding relevant regulations, statutes, and international documents.

At times mere criticism of the results of these cases would be trivial. All courts make mistakes from time to time. The failure lies elsewhere. The Court has consistently used a mechanical approach to interpretation and excluded an exploration of statutory purpose. It has consistently submerged the purpose or "spirit" of documents in favor of a faulty, literalist approach. At times, especially in procedural cases, this tendency has been driven by an obviously inhospitable view of aliens. Although this sentiment is sometimes difficult to pinpoint, frequently expressing itself in very subtle ways, at times it comes to the fore. For example, Justice Scalia, discussing selective prosecution as a defense to removal, wrote:

Whereas in criminal proceedings the consequence of delay is merely to post-

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1. See 8 C.F.R. § 3.1 (1997).

2. The Court's treatment of constitutional challenges to immigration legislation has been explored extensively. That literature has adopted the term "plenary power" to describe the extreme deference paid to Congress in the face of these attacks. See e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

pone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law. Postponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding³

The image of the alien litigant as someone who has no business being in this country, yet is desperately trying to stay, has driven some decisions by both the Court and lower courts. Representing part of this country's ambivalence toward aliens, this anti-alien sentiment has surfaced with some frequency as the Court has taken a kind of no-nonsense, gatekeeper approach to those whom it regards as visa abusers.

Predominantly, these decisions are characterized by a mechanical brand of interpretation, vaulting "plain meaning" above purpose and frequently overlooking the reasons behind the documents under inspection. For example, rather than inquiring into simply why domestic law prohibits the expulsion of aliens to places where their "life or freedom would be threatened,"⁴ the Court became obsessed with the significance of the term "would."⁵ Rather than focusing on why this protection was provided and how it comported with our obligations under international law, the Court engaged in a parochial analysis of language that ignored these obligations entirely. Worse, because of its over-reliance on *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*,⁶ so long as it could defer to administrative interpretations, the Court has frequently engaged in a perfunctory analysis of documents.

Statutory interpretation is an imprecise undertaking that must begin, at least, with an analysis of the language used. The Court has not failed us because of its insistence that language be regarded carefully. Rather, it has resorted to a plain meaning approach that does violence to both statutory language and purpose.

The classic exposition on purpose guiding interpretation came from Henry Hart and Albert Sacks. As the dominant legal process thinkers of their generation, they admonished interpreters to strive to determine statutory purpose, and subordinate the language to that purpose. So long as a court gives statutory lan-

3. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999).

4. 8 U.S.C. § 1231(b)(3)(A) (1996). This language is from the provision of the Immigration and Nationality Act captioned "Restriction on removal to a country where alien's life or freedom would be threatened." It was formerly known as withholding of deportation, and these terms are used at times in this article. *See id.*

5. *INS v. Stevic*, 467 U.S. 407, 422 (1984).

6. 467 U.S. 837 (1984).

guage a meaning it will bear and that meaning would not violate any "established policy of clear statement,"⁷ "it must decide what purpose should be attributed to the statute" and then "interpret the words . . . immediately in question so as to carry out the purpose as best it can"⁸

Upholding that tradition, Eskridge and Frickey have carried forward this idea. Because agencies are politically accountable,⁹ the authors heralded *Chevron* as an "important recognition of dynamic statutory interpretation in the modern administrative state."¹⁰ They recognized that agencies were best positioned to interpret statutes to fit harmoniously within the modern legal landscape. Hart and Sacks themselves regarded agency interpretation as "conclusive if it is consistent with the purpose properly to be attributed to the statute, and if it has been arrived at with regard to the factors which should be taken into account in elaborating it."¹¹ Language alone is barren, and courts should examine statutory language as expressive of some legislative purpose. Though this may complicate statutory analysis, the concept of statutes without purpose, some grouping of disembodied words, is an absurdity that must be rejected.

This Article will analyze the Court's methodology through two lines of decisions. First, it will examine the decisions on motions to reopen removal proceedings. The Court has concluded that these motions can be discretionarily denied.¹² Second, it will examine the cases on withholding of deportation¹³ and note the manner in which the Court's approach to these cases ignored the clear dictates of humanitarian law. Rather than interpreting domestic law so that it conforms to our international obligations, the Court has tried to shoehorn international documents into its interpretations of our domestic law. This contrasts with how courts outside the United States have behaved, and effectively exalts *Chevron* principles over the dictates of *Murray v. Schooner Charming Betsy*.¹⁴ Finally, this Article will consider how *Chevron* itself presents a rationalization

7. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William Eskridge, Jr. & Phillip Frickey eds., 1994).

8. *Id.*

9. Eskridge and Frickey have long stressed the need to update statutory interpretation through what they call dynamic interpretation. Rather than viewing statutes as having a fixed meaning in time, they regard them as living documents whose meaning must frequently change over time. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 358-62 (1990).

10. WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 861 (2d ed. West Pub. Co. 1995).

11. HART & SACKS, *supra* note 7, at 1380.

12. The Court initially did this in the context of a case that was denied plenary consideration. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

13. See *supra* note 4 and accompanying text.

14. 6 U.S. 64, 118 (1804).

and a means for the Court to avoid its duty to engage in judicial review.

The Court made choices that created this situation. Through its selection of interpretive tools, the Court has chosen plain meaning over purpose. It has deferred to *Chevron*, which clearly conflicts with *Charming Betsy*, and neglected its obligation to adhere to international norms. Finally, in the very manner in which it has implemented *Chevron*, the Court has made choices about whom to regard as the agency for its purposes.¹⁵ Despite the disconnect between *Chevron* and the reality of administrative immigration decision-making,¹⁶ and the absence of any real locus of decision-making within the entire immigration system, the Court has deferred to those decisions least favorable to aliens.

II. RE-OPENING

A. *INS v. Jong Ha Wang*¹⁷

INS v. Wang involved a routine case in which the Ninth Circuit and the Board split on a matter of statutory interpretation. Unfortunately, the Court's treatment of that split exemplifies all that is wrong with its handling of immigration cases. Its anti-alien tone and strained, ill-reasoned interpretation of the governing regulations launched the Court on the odd, misbegotten path on which it now finds itself.

The Wangs came to this country as nonimmigrant treaty traders. Having overstayed their visas they faced deportation. Based on their lengthy presence in this country, they resisted deportation by seeking a "suspension of deportation."¹⁸ They claimed that their forced removal from the United States would

15. At times, the Court has selected the Board, at other times the Attorney General.

16. If one regards *Chevron* as being founded on the notion of agency expertise, it makes sense to apply it after a careful consideration of the issues when agencies are construing technical provisions of their governing statutes. However, that model often runs afoul of reality. In immigration law we have different notions of "agency," including the BIA, the Attorney General, and Immigration Judges, which brings different degrees of focus to the decision-making process. It is one thing for the Board to decide a case in a published, precedent decision; it is quite another to dispose of an important case in an unpublished opinion. See generally, Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 870 (1994).

17. 450 U.S. 139 (1981).

18. At that time, the relief known as "suspension of deportation" was available to someone who had been physically present in the United States for at least seven years continuously, was of good moral character, and whose expulsion would cause extreme hardship to the alien, his spouse, parent or child. That provision was changed substantially in 1996. Now, it requires a ten-year presence and the alien must show that the removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." It is now called cancellation of removal. 8 U.S.C. § 1229(b) (1996).

produce extreme hardship to themselves and their U.S.-born minor children. Their claims centered on economic loss and educational and cultural problems for their children. The split between the Board and the Ninth Circuit centered squarely on the content of the term "extreme hardship." Since any alien forced to leave after a seven-year presence would experience some difficulties, hardship obviously encompassed more.

The Wangs sought to prove their hardship claim in a new hearing.¹⁹ Thus, the situation involved applicants seeking relief in an arena allowing the presentation of evidence and witnesses testimony. The Board and Ninth Circuit simply split on the issue of eligibility. The Board felt that economic hardship and disadvantage to minor children did not rise to the level of hardship; however, the Ninth Circuit reversed.²⁰ The posture of the case before the Court was simple. It only had to determine the kind of hardship claim necessary to entitle applicants to a hearing and delineate the proper meaning of the term "extreme hardship."

The Court addressed both issues. First, it found that the Wangs failed to meet the evidentiary requirement of the relevant regulation by not providing affidavits in support of their hardship claim.²¹ Second, it found that the Board's finding should not be disturbed simply because the Court "may prefer another interpretation of the statute."²² The Court simply affirmed the notion that agency findings should not be overturned lightly; however, its dicta proved quite exceptional.

Surely the Wangs could have been regarded as visa abusers, especially when the backlogs for their native Korea remained terribly long. Regardless, that should not have informed the Court's interpretation of the controlling regulation. At the time, a motion to reopen could be granted if an alien, through the presentation of previously unavailable evidence, made out a *prima facie* case for the relief sought. Their claim was based, then, on having become eligible for relief during the pendency of the case. Commenting on the regulation that provided for such motions, the Court stated:

The present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.²³

19. Having finally been in the United States more than seven years, the Wangs only satisfied the eligibility requirements for suspension after their first hearing.

20. *Jong Ha Wang v. INS*, 622 F.2d 1341 (9th Cir. 1980)(en banc).

21. *See Wang*, 450 U.S. at 143.

22. *Id.* at 144.

23. *Id.* at 143 n.5.

Apparently, the Court regarded the prefatory language of the regulation that indicates motions "shall not be granted unless"²⁴ the stipulated conditions are met as signaling a distaste for such motions. Yet the language hardly says that; it simply expresses the legal conditions that have to be satisfied to warrant reopening.²⁵ By emphasizing the "shall not" language, the Court twisted the regulation to bestow discretion upon the Board to deny otherwise meritorious motions. But why do that? Why grant that kind of carte blanche to the Board?

The same footnote went on to quote from a dissenting opinion in the Ninth Circuit.²⁶ In the Ninth Circuit case, Judge Wallace expressed an enormous antipathy for aliens like the Wangs. He maintained:

If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.²⁷

Thus, the Court invested the Board with a new kind of discretion. Having constructed this zone of discretion in the regulation, it now granted the Board the power to discretionarily deny motions, even if based on its dislike for the movants. Through this one move, the Court misconstrued a very simple regulation and made gratuitous, cynical, and offensive comments about the alien applicants. Apparently the Court believed the opinion in the Ninth Circuit decision could be read as a "blueprint for any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years"²⁸ to become a permanent resident. In the process, the Court construed the regulation to disfavor people it obviously deemed unworthy. It did this without affording plenary consideration, for there were neither briefs nor oral argument in *Wang*.²⁹

Since *Wang*, both the regulations and relevant statutes it considered have undergone substantial change. Reflecting the Court's thinking, the regulations now expressly provide the Board with the discretion to deny a motion regardless

24. 8 C.F.R. § 3.2 (1979).

25. At that time, the evidence had to be material and unavailable at the former hearing. *Id.*

26. See *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980) (Wallace, J., dissenting).

27. *Wang*, 450 U.S. at 143 n.5 (quoting *Villena*, 622 F.2d at 1362 (Wallace, J., dissenting)).

28. *Id.* at 145 (quoting *Villena*, 622 F.2d at 1352 (Goodwin, J., dissenting)).

29. Justices Brennan, Marshall, and Blackmun said they would have granted the petition for certiorari and given the case plenary consideration. See *Wang*, 450 U.S. at 144.

of its merits.³⁰ More significantly, the successor to the suspension of deportation statute that the Court examined in *Wang* has been substantially amended.³¹ Now, to be eligible for what is known as cancellation of removal,³² a nonpermanent resident must have been here for ten years.³³ Congress has likewise changed the way in which the period of presence is calculated. The "Notice to Appear" in removal proceedings legally marks the end of the alien's physical presence in the United States, thus avoiding the problems confronted in cases such as *Wang*. Immigration benefits simply cannot be garnered through post-service time spent here.³⁴ Finally, the number of motions has been reduced to one and for most purposes, that motion must be filed within ninety days from the date of entry regarding a final order of removal.³⁵

Wang reflected the value of streamlining the administrative process to avoid frivolous and dilatory tactics, and subsequent legislative and regulatory changes enhance its potency.³⁶ However, critics of these changes can take some solace, since those such as the Wangs may not suffer unduly. They may encounter difficulties upon their forced return to their homelands, but they do not face any apparent challenge to survival itself. Unfortunately, the Court's next foray into this area was much more ominous.

30. "The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 3.2(a) (1999). This provision was added through 61 Fed. Reg. 18904 (Apr. 29, 1996). The change was inspired by the Court's language in *Stone v. INS*, 514 U.S. 386, 399 (1995). The Court talked of Congress' "fundamental purpose . . . 'to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.'" *Stone*, at 399 (quoting *Foti v. INS*, 375 U.S. 217, 224 (1963)).

31. 8 U.S.C. § 1229b (b)(1)(A) (1997).

32. See *supra* note 18.

33. 8 U.S.C. § 1229b (b)(1)(A) (1997).

34. *Id.* at § 1229b (d)(1).

35. 8 U.S.C. § 1229a (c)(6)(A) (1996). For asylum cases, the one exception exists in 8 U.S.C. § 1229a (c)(6)(A)(ii). However, the claim must be based on a change in country conditions, not in the alien's situation.

36. *Wang* by no means stands alone in its attitude toward litigious aliens. The Court expressed its disgruntlement several years later very pointedly in *INS v. Rios-Pineda*, 471 U.S. 444 (1985). In a suspension of deportation case involving the residency period accrued during proceedings, the Court was most disapproving of the treatment by the Eighth Circuit Court of Appeals. The majority held, "[i]n administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process." *Id.* at 450-51.

*B. INS v. Abudu*³⁷

Assibi Abudu had a long and troubled stay in the United States. He originally entered the United States as a student in 1965. He maintained that status, graduated from medical school, and became a licensed physician in the United States. After having married a United States citizen, he overstayed his visa and was eventually convicted of a drug offense in 1981. He was found deportable in 1982, and the Board dismissed his appeal in 1984.³⁸

In 1985, he filed a motion to reopen, seeking asylum and withholding of deportation for the first time. By his account, he had been visited by a highly placed official in the Ghanaian government, ostensibly because physicians were in short supply in Ghana. Abudu claimed that he was concerned that the official's actual purpose involved discovering the location of Abudu's brother, an exiled enemy of the Rawlings government. Likewise, he feared that he was being lured back because of his close association with Lt. Col. Joshua Hamidu, the government's key enemy.³⁹ The Board denied the motion, concluding that the "visitor was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit."⁴⁰

As with *Wang*, the Court could have handled this case simply and merely set the standard for review of the Board's determinations. It went well beyond that. Although it claimed that the case was only about "the standard that a Court of Appeals must apply when reviewing the BIA's conclusion that an alien has not reasonably explained his failure to assert his asylum claim at the outset,"⁴¹ the Court addressed far more.

First, elevating footnote to text,⁴² the Court quoted extensively from *Wang* and reiterated its view that the regulation on reopening creates a zone of discretion for the Board.⁴³ Thus, comments in dicta from a *Wang* footnote now enjoyed a grander status in the Court's caselaw. Explaining why such motions are disfavored, Justice Stevens stated that "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases."⁴⁴ The Court's choice of authority and the analogies it drew⁴⁵ showed a

37. 485 U.S. 94 (1988).

38. See *Abudu v. INS*, 802 F.2d 1096, 1098 (9th Cir. 1986).

39. See *id.* at 1099.

40. *Abudu*, 485 U.S. at 98.

41. *Id.* at 104.

42. See 8 C.F.R. § 3.2 (1979).

43. See *Abudu*, at 105.

44. *Id.* at 107.

45. The Court cited cases involving the former Interstate Commerce Commission, the Envi-

clear insensitivity to what was at issue in Abudu's case and demonstrated what one commentator has called its "docket-clearing mindset."⁴⁶

Not content to simply repeat itself, the Court created a "super-strong" breed of deference to agency decisions. Treating the Executive Branch as a monolith, it wrote:

In sum, although all adjudications by administrative agencies are to some degree judicial and to some degree political -- and therefore an abuse-of-discretion standard will often apply to agency adjudications not governed by specific statutory commands -- INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.⁴⁷

The Court again had a choice. It could have recognized the potential harm that Dr. Abudu faced, and adjusted its standard of review to accommodate his human rights interest. Instead, rejecting that approach, it characterized the Board's decision as political and relied on *Hampton v. Mow Sun Wong*.⁴⁸

Hampton involved a challenge to a Civil Service Commission rule requiring citizenship for employment in the federal civil service. In an opinion also written by Justice Stevens, the Court found that the Civil Service Commission lacked the democratic legitimacy to establish such a rule.⁴⁹ *Hampton* undercut the Court's position in *Abudu*. In *Hampton*, Justice Stevens wrote:

It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. . . . On the contrary, the Commission performs a limited and specific function.⁵⁰

The same can be said of the Board. Originally created by the Attorney General,

ronmental Protection Agency and similar agencies that addressed licensing and other technical issues. *Id.* at 107 n.11.

46. See Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 477 (1993).

47. *Abudu*, 485 U.S. at 110 (footnotes omitted).

48. 426 U.S. 88 (1976).

49. See *id.* at 115-17.

50. *Id.* at 114.

the Board's members decide immigration appeals. The Board merely operates as an administrative tribunal. Though its decisions may obliquely have some effect on relationships with other countries, the Board enjoys no more authority to forge foreign policy than the Civil Service Commission.⁵¹ Yet, rather than furthering the humanitarian interests recognized the prior term in *INS v. Cardoza-Fonseca*,⁵² the Court here turned a deaf ear to the alien.

C. *INS v. Doherty*⁵³

Doherty seemed likely to attract the attention of the Court and the country generally.⁵⁴ *Doherty*, a former member of the Provisional Irish Republican Army, was tried in Belfast for the killing of a British soldier in 1980. He escaped prior to a verdict, was convicted in absentia, and later sentenced to life imprisonment.⁵⁵ After an extraordinary saga, he eventually found himself embroiled in a case involving extradition, deportation, numerous other legal proceedings, and the intervention of two Attorneys General.⁵⁶

His case reached the Court only after he had succeeded twice before the Board, which was reversed by each Attorney General. Thus, when the case reached the Court, it had to rule on the correctness of Attorney General Thornburgh's reversal of the Board on the issue of his motion to reopen to prove entitlement to asylum and withholding. The case splintered the Court⁵⁷ and further heightened the confusion surrounding motions to reopen.

In many respects, *Doherty* mirrored *Abudu*. In each case, the alien sought to reopen to prove entitlement to asylum and withholding and was denied at the

51. Oddly, the foreign affairs power is not mentioned explicitly in the United States Constitution. As Louis Henkin said, "[t]he attempt to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution has not been accepted as successful." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 17 (1972).

52. 480 U.S. 421 (1987). Writing for the Court, Justice Stevens maintained that "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Id.* at 449.

53. 502 U.S. 314 (1992).

54. The case drew an unusual level of public attention. Among the numerous briefs filed with the Court included one drafted by 132 members of Congress. Its membership was diverse, including a wide array of the political spectrum, including Utah Republican, Sen. Orrin Hatch. *See generally* Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives in Support of Respondent, *INS v. Doherty*, 502 U.S. 314 (1992) (No. 90-925).

55. *See Doherty*, 502 U.S. at 317.

56. The two Attorneys General were Edwin Meese and Richard Thornburgh.

57. The opinion for the Court was written by Chief Justice Rehnquist. Only Part I of the case drew a majority, in which Justices White, Blackmun, O'Connor, and Kennedy joined Chief Justice Rehnquist. *See Doherty*, at 316.

agency level. Yet, only part of the Court's opinion commanded a majority of the justices. Justice Scalia dissented in part⁵⁸ from the Court's conclusion that the Attorney General had not abused his "broad discretion in considering motions to reopen."⁵⁹

Noting that even discretion "has its legal limits,"⁶⁰ Justice Scalia departed from the mechanical approach and broad language that led to so much rubber-stamping in prior cases.⁶¹ Instead, he began by resisting the Court's view that a motion to reopen was similar to asking that a judgment be reopened, something that rarely takes place.⁶² Rather, Justice Scalia analogized the motion to a "remand for further proceedings."⁶³ Propelled by that purpose-oriented approach to the regulation, he dissented sharply based on the Court's conflation of motions seeking to prove asylum and those seeking withholding. Because withholding is mandatory relief, Justice Scalia would have narrowed the Attorney General's power significantly.⁶⁴ Even conceding that "the act of reopening a concluded proceeding is itself a discretionary one"⁶⁵ he concluded that it was not as discretionary as the term reopening might suggest.

Though the language "as discretionary" might seem bewildering, Justice Scalia seemed to be calling for what Professor Kevin Johnson called a "hard look" approach to judicial review of this kind of agency decision making.⁶⁶ Withholding of deportation prohibits the Attorney General from removing a refugee to a country in which her life or freedom would be threatened. Because of the strong humanitarian concern expressed by this principle of withholding of deportation, Justice Scalia seemed correct in carefully scrutinizing the Attorney General's decision to deny a hearing on that issue. The majority of the Court simply repeated the "mumbo jumbo" discretion talk of prior Courts.

A second problem with *Doherty* consists of its unitary approach to agency

58. See *id.* at 329 (Scalia, J., dissenting). Justices Stevens and Souter also joined Justice Scalia in dissent.

59. *Id.* at 326 (plurality).

60. *Id.* at 330.

61. *Abudu* did not stand alone. On other occasions, the Court ruled similarly on motions to reopen. See *INS v. Rios-Pineda*, 471 U.S. 444, 449–52 (1985); *INS v. Phinpathya*, 464 U.S. 183, 195 (1984).

62. See *Doherty*, at 330 (Scalia, J., dissenting).

63. *Id.* at 331 (Scalia, J., dissenting).

64. See *id.* at 332 (Scalia, J., dissenting). Unfortunately, he did defer to the Attorney General on the asylum issue, stating that "*Doherty* is a sufficiently *unsavory character* not to be granted asylum in this country." *Id.* at 333 (Scalia, J., dissenting) (emphasis added).

65. *Id.* at 341 (Scalia, J., dissenting).

66. Kevin R. Johnson, A 'Hard Look' at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279, 310 (1991). Acknowledging the variety of choices of models for judicial review of agency decision making, Professor Johnson suggested that the hard look approach seemed particularly appropriate where the questions were largely legal and the stakes great. *Id.* at 324–25.

decision making. Countless opinions refer to the Attorney General's decisions, but in reality, immigration judges and the Board make most decisions.⁶⁷ Indeed, *Doherty* represented one of the few exercises of review power by the Attorney General on record. Thus, though *Chevron* provides an approach to agency decision making, the decisions of immigration judges, the Board, and the Attorney General would seem to stand on very different footings and command different levels of deference. Immigration judges have immediate access to witnesses and evidence. The Board hears countless appeals and has built a substantial repository of legal expertise, at least as expressed in its precedent decisions.⁶⁸ Finally, the Attorney General is the most politically accountable member of this grouping and has the highest visibility. However, if *Chevron* is about deference based on comparative competence and respect for administrative decisions, the Board seems to require the most deference, a point neglected in *Doherty* perhaps because of the Court's muddled, monolithic image of the immigration system. Competence and authority are simply not synonymous.

The cases on reopening have severely constricted judicial review. Animated by a cynical view of alien applicants and a strangely focused view both of the purpose of the motion and meaning of the regulation, they have consistently denied requests for a forum in which to be heard. However, the cases do not deny aliens access to relief in the first instance. Unfortunately, this cannot be said of the Court's body of law on withholding of deportation. There, the Court has twisted the relevant domestic and international law and shown almost a disdain for its position among courts in the world community.

III. WITHHOLDING OF DEPORTATION

Until comparatively recently, the United States had no single, ideologically neutral legislation on asylum and refugee law.⁶⁹ In 1948, in the aftermath of World War II, Congress passed the Displaced Persons Act,⁷⁰ our first major piece of refugee legislation. This law addressed the plight of those stranded by the war and ultimately provided for the admission of 400,000 people. Thereafter, the United States episodically embarked on various programs, in response to

67. The Attorney General is charged with the administration and enforcement of our immigration laws. See 8 U.S.C. § 1103 (1996).

68. The Board chooses the decisions it wishes to count as precedential on certain issues. "[S]elected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues." 8 CFR § 3.1(g) (1997).

69. For a discussion of the odd history in this area, see generally GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986).

70. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (repealed 1950).

problems throughout the world. The 1965 amendments to the Immigration and Nationality Act created a seventh preference category that ultimately provided permanent residence for refugees,⁷¹ but was limited to those who had either fled a "Communist or Communist-dominated country" [or one] within the general area of the Middle East."⁷² Refugee rights were still ideologically linked, though not country-specific.

That changed with the enactment of the Refugee Act of 1980.⁷³ Congress created a single definition of refugee and clearly sought to bring our domestic law into conformity with our international obligations.⁷⁴ Indeed, in the celebrated case of *Cardoza-Fonseca*,⁷⁵ the Court reiterated the primacy of Congress' purpose to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," thus harmonizing our domestic law and international obligations.⁷⁶

Unfortunately, domestic practice had been a muddle in its interpretation of critical terms of both domestic and international law. Yet that was somewhat understandable, given the "hydra-headed" nature of our refugee law. With the passage of the Refugee Act, Congress provided several avenues of protection for refugees. First, the United States created the overseas refugee program through which refugees are admitted to this country. Thus, at the beginning of the fiscal year, the President consults with Congress on the plans for refugee admissions.⁷⁷ Thereafter, the President issues a determination that sets numerical ceilings for the year and specifies the places from which the refugees will be admitted.

Second, aliens present in the United States may apply for asylum under our immigration laws.⁷⁸ To achieve that status, they must satisfy the statutory defini-

71. Although they entered via conditional entry, they had a ready path to adjustment of status two years thereafter.

72. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913.

73. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. §§ 1521-24 (1982)).

74. The internationally accepted definition of refugee is based on the Geneva Convention and U.N. Protocol, to which the United States is a signatory. See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention]; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]. Under Article I(1) of the Protocol, "[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." *Id.* at 606 U.N.T.S. 268.

75. 480 U.S. 421 (1987).

76. 480 U.S. at 436.

77. Sections 207 and 209 of the Immigration and Nationality Act govern the process through which the overseas program operates and refugees ultimately become permanent residents. See 8 U.S.C. §§ 1157, 1159 (1988).

78. See 8 U.S.C. § 1158 (1996).

tion of refugee, which essentially duplicates the Convention definition. A grant of asylum can then lead to adjustment to permanent resident status after one year for asylees, so long as they remain refugees within the meaning of our laws. However, though they may adjust their status, most feel that the asylum itself may be discretionarily denied.⁷⁹ Thus, as construed, it does not provide a mandatory form of human rights protection.

By contrast, the third form of protection for refugees, withholding of deportation, binds the Attorney General, preventing her from removing a refugee to a place where her life or freedom would be threatened.⁸⁰ Though this section essentially repeats the definition of refugee, it is not identical. Rather, it acts as an absolute constraint on the Attorney General, applies to aliens generally, and requires that their life or freedom would be threatened based on one of the five factors mentioned in the definition of refugee.⁸¹ Thus, this third form of refugee protection might seem to impose a different burden on the withholding applicant than on the asylum seeker.

In *Cardoza-Fonseca* the Court decided what showing of persecution the asylum seeker must make. Not until then did the Court provide a meaningful gloss on the term "well-founded fear of persecution."⁸² Yet, withholding might be different. Though, arguably, an essential right of refugees is to be free from

79. The Immigration and Nationality Act provides that the "Attorney General *may* grant asylum" to a qualifying alien. 8 U.S.C. § 1158 (b) (emphasis added). This has usually been interpreted to mean that asylum may be denied even if the alien meets the statutory criteria. However, Professor James Hathaway and Anne K. Cusick have argued that this misconstrues the requirements of international law, asserting that asylum must be granted where legally warranted. See James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481 (2000) [hereinafter Hathaway]. They stated:

Our analysis below aims to show how the substitution by the United States Supreme Court of discretion for entitlement is irreconcilable to our treaty obligations, in that it creates protection gaps which expose genuine Convention refugees to both the risk of refoulement and, more generally, to treatment below international norms.

Id. at 488.

80. "Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231 (b)(3)(A) (1996).

81. The definition of refugee is more grudging than might be expected. Not only must one have a well-founded fear of persecution, but the persecution must be feared because of one of five factors: race, religion, nationality, membership in a particular social group or political opinion. See 8 U.S.C. § 1101(a)(42) (1996).

82. This standard is key to the definition of refugee. Until *Caroza-Fonseca*, domestic practice was inconsistent, if not simply wrong, in its interpretation of this standard. The definition now appears at 8 U.S.C. § 1101(a)(42) (1998).

exposure to danger from the forced return to places that exposed them to threats to life or freedom, administrative practice trampled that apparent right.⁸³ Thus, when the case of Pedrag Stevic came before the Court in 1983, the Court had an opportunity to reaffirm our adherence to international obligations and set a single standard for both the asylum seeker and withholding applicant.⁸⁴ The Court could bring coherence to our humanitarian law by affording refuge to those with legitimate fears of persecution, and surely forsake the unspeakable of countenancing the forced return of refugees to places where they were refugees. It did neither.

A. *INS v. Stevic*⁸⁵

INS v. Stevic provided the Court with its first opportunity to interpret the Refugee Act. Raising an apparently simple issue, it required the Court to determine the burden borne by an alien seeking withholding of deportation. Unfortunately, in addressing this task, the Court mangled both the language and purpose of the Act, obdurately insisting that the Refugee Act had scarcely changed pre-existing law.

Stevic's stay in the United States began in 1976, when he entered for temporary purposes.⁸⁶ He was found deportable later in that year, did not depart on time, but married a United States citizen and sought reclassification on that basis. Sadly, she died pending the processing of his application. Ultimately, he sought to reopen deportation proceedings to seek asylum and withholding.⁸⁷ It was then, for the first time, that he claimed a fear of persecution were he returned to his native Yugoslavia.

He claimed that he feared persecution because of his political activities in an émigré anti-communist organization known as the Ravna Gora.⁸⁸ His father-in-law, a United States citizen, had also been a member, yet was imprisoned while traveling in Yugoslavia for violating the hostile propaganda laws of that country which criminalized any criticism of government policy made anywhere

83. Regarding *In re Dunnar*, 14 I. & N. Dec. 310 (BIA 1973), the Board noted that the Protocol was self-executing, having "the force and effect of an act of Congress." *Id.* at 313. Yet despite that, it insisted on the fact that withholding was both discretionary and required the alien to establish a "clear probability" of persecution to be granted this remedy.

84. *INS v. Stevic*, 467 U.S. 407 (1984). Professor Hathaway and Ms. Cusik argue that only in a unified system in which the burdens are identical can we honor our duty to refugees. See Hathaway, *supra* note 79, at 513.

85. 467 U.S. 407 (1984).

86. The facts appear more fully in the Second Circuit opinion than in that of the Court. *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982).

87. By regulation, an application for asylum automatically also became one for withholding.

88. See *Stevic*, 678 F.2d at 403.

in the world. His father-in-law served three years in prison and, apparently, committed suicide after release.

The Board twice denied motions to reopen, essentially on the grounds that Stevic failed to make out a *prima facie* case for the relief sought.⁸⁹ However, since the Board previously held that withholding required proof of a "clear probability" of persecution, he had presumably failed to meet that standard. The Second Circuit reversed, concluding that its "obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing BIA decisions under grants of discretionary authority"⁹⁰ Having determined that withholding should be granted on a standard "far short of a 'clear probability' that an individual will be singled out for persecution,"⁹¹ the court used its review power to reverse the Board.

In reaching that result, the court gave primacy to the Protocol and its interpretation in the High Commissioner's Handbook.⁹² Thus, because the Handbook had been specifically created to aid governments in the interpretation of the Protocol, the Second Circuit concluded that it should be accorded "considerable weight."⁹³ According to the court, the Board had applied an incorrect standard, one inconsistent with the Protocol and its interpretation in the Handbook.

The Supreme Court's opinion provided a stunning contrast to that of the Second Circuit. Partaking of a strange parochialism, the Court proceeded to emphasize domestic law over its international counterparts. Though the Court acknowledged that the Refugee Act was passed to "establish a systematic scheme for admission and resettlement of refugees,"⁹⁴ it nevertheless insisted that the "Protocol was largely consistent with existing law."⁹⁵ Quoting from the Board's opinion in *Dunnar*, it concluded that the Protocol had "effected no substantial changes in the application of section 243(h), either by way of burden of

89. *See id.*

90. *Id.* at 409.

91. *Id.*

92. The office of the United Nations High Commissioner for Refugees (UNHCR) has published a handbook on refugee issues that gives detailed analyses of refugee law. It is cited frequently throughout the world. *See generally* UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter Handbook].

93. *Stevic*, 678 F.2d at 409.

94. *Stevic*, 467 U.S. at 425.

95. *Id.* at 417. Elsewhere, the Court struck the same note, concluding that "[e]xisting domestic statutory law in 1968 was largely consistent with the Protocol." *Id.* at 428. Indeed, though the Court conceded that prior law made withholding discretionary, it then neutered the difference by noting that the "Attorney General, however, could naturally accommodate the Protocol simply by exercising his discretion to grant such relief" *Id.*

proof, coverage, or manner of arriving at decisions.”⁹⁶ This it said despite the fact that withholding was discretionary under prior domestic law, thus providing a stark contrast with the Protocol.⁹⁷

At this point, the Court’s task was simple. Since domestic law had embraced the “clear probability” standard, it only remained to determine whether there was any evidence in the Refugee Act of a clear departure from that standard. It resolved this issue largely through its gloss on the word “would.” Noting that it was inferring such a standard from the “bare language” of the section on withholding,⁹⁸ it nevertheless concluded that “would” did not denote “might” or “could.”⁹⁹ Rather than trying to make sense of the phrase “life or freedom would be threatened,” the Court emphasized the word “would,” interpolating in the word “persecution” at the end despite its absence. In other words, the Court simply inserted the term “persecuted” rather than inquire whether “threatened” was intended to be synonymous.

The Court’s reasoning was wrong on several levels. First, it gives primacy to the qualifier “would” without asking what it relates to. Since the Convention and domestic law use the word “threatened,” it is odd not to even note that usage. Had the Court bothered to inquire, it could easily have concluded that “threatened” signified something less than “persecution.” A plain-meaning analysis would have at least yielded that result. However, the Court’s failure went deeper.

Article 31 of the Convention also uses the term “threatened.”¹⁰⁰ It prevents contracting States from imposing penalties on “refugees . . . coming directly from a territory where their life or freedom was threatened in the sense of Article 1”¹⁰¹ This completely dissolves any ambiguity with the Article 33 usage. Rather than repeating the entire definition of refugee, the drafters of the Convention used the “threatened” language as a kind of shorthand. The reference to Article 1 makes this clear.¹⁰² But even were this not so, one would expect that the Court would ask why the standard for withholding relief would be more demanding than that for asylum. In addition, one would also expect the

96. *Id.* at 418–419 (quoting *In re Dunnar*, 14 I. & N. Dec. at 323).

97. Though the United States had not acceded to the Geneva Convention, our accession to the Protocol bound us to its terms. Under Article I of the Protocol, “[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” Protocol, *supra* note 74, at 6225.

98. See *Stevic*, 467 U.S. at 422.

99. See *id.*

100. See Convention, *supra* note 74, at 174 (Art. 31(1)).

101. *Id.*

102. Paul Weis has made the same point. “In the course of drafting the words ‘country of origin,’ ‘territories where their life or freedom was threatened’ and ‘country in which he is persecuted’ were used interchangeably.” PAUL WEIS, *THE REFUGEE CONVENTION*, at 303 (1995).

Court to consider why Congress and the Convention drafters would, to use Professor Hathaway's language, create a "subset of super-refugees."¹⁰³

Instead, the Court resisted a more generous interpretation of withholding. Repudiating the Second Circuit's position, the Court concluded that:

[The Second Circuit's] decision rests on the mistaken premise that every alien who qualifies as a 'refugee' under the statutory definition is also entitled to a withholding of deportation under § 243(h). We find no support for this conclusion in either the language of § 243(h), the structure of the amended Act, or the legislative history.¹⁰⁴

Without examining the purpose of this provision, it essentially based the decision on the presence of one word, and botched its interpretation there. Rejecting any reference to purpose, the Court essentially approved the deportation of refugees to places of great danger, a thoroughly counterintuitive move.

This contrasted sharply with the Second Circuit's view. Championing America's theme of "welcoming homeless refugees to our shores,"¹⁰⁵ that court could not tolerate the anomaly of subjecting applicants to the stringent standard argued for by the government. By its view, "[w]here the choice is between a concededly rigorous standard which would subject some potential asylees to the risk of persecution and a more generous one which tilts toward protection from such risk, the strongly humanitarian rhetoric accompanying the legislation is helpful to interpretation."¹⁰⁶

From the perspective of damage control, there is some solace in the notion that withholding applicants also seek asylum and the likelihood of a discretionary denial of asylum is not great. Yet, from the perspective of the development of humanitarian law, the Court's position is disturbing. Faced with an opportunity to express our commitment to humanitarian law and international norms, the Court effected a parochial retreat in an ill-conceived, poorly reasoned opinion showing no sensitivity to the interests and human concerns involved. Indeed, the following year, in *Cardoza-Fonseca*, it repeated the inanities of *Stevic*, rather than retreating from them.¹⁰⁷

The Court's first interpretation of the Refugee Act is troubling, but this was

103. Hathaway, *supra* note 79, at 485.

104. *Stevic*, 467 U.S. at 428.

105. *Stevic*, 678 F.2d at 408.

106. *Id.*

107. Comparing *Stevic*, the Court said that "Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a 'refugee,' i.e., prove at least a 'well-founded fear of persecution'; second, that the 'refugee' show that his or her life or freedom 'would be threatened' if deported." *Cardoza-Fonseca*, 480 U.S. at 441.

not to be its last effort in the area of withholding. In the two cases that followed in the 1990s, it confronted some immense challenges to humanitarian law. It would be called upon to decide both those who could be denied withholding because of their criminal conduct abroad and the very geographic reach of humanitarian law.

*B. Sale v. Haitian Centers Council*¹⁰⁸

The mass migration of aliens to the United States has long been troubling. In recent years, the United States has witnessed the sad spectacle of large groups of aliens setting sail from Cuba, Haiti, and elsewhere. Many often die at sea or otherwise suffer, simply in hopes of making it to the protection of our shores. Surely, we cannot hope to accommodate all who seek to come here. Thus, in 1981, President Reagan initiated an interdiction program that included a screening process to determine whether the interdicted aliens presented credible fears of persecution.

Following the overthrow of President Jean-Bertrand Aristide of Haiti in 1991, thousands fled Haiti, were screened to determine their refugee status, but were not summarily repatriated. Policy changed profoundly one year later. In what has become known as the Kennebunkport Order, President Bush directed the Coast Guard to intercept vessels sailing illegally to the United States and return their passengers to their countries of origin.¹⁰⁹ Though not explicitly mentioning Haiti, the day after the order was signed the White House Press Secretary said that the President had "issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti."¹¹⁰ In response to this stepped-up policy of interdiction, a lawsuit was filed against the INS, the Attorney General and others, claiming that this interdiction and repatriation violated both the Refugee Act and the Protocol.¹¹¹ After the plaintiff's success in the Second Circuit,¹¹² the government successfully petitioned for certiorari and the case came before the Court.

Though complex, much of *Sale* turned on the meaning of the language of the two governing provisions, § 243(h) of the INA and Article 33 of the Convention. The immigration statute prohibited the Attorney General from returning any alien to a place of danger¹¹³ and the Convention prohibited any "Contracting

108. 509 U.S. 155 (1993).

109. Exec. Order No. 12,807, 3 C.F.R. 303 (1993), *reprinted in* 8 U.S.C. § 1182 (1994).

110. *Sale*, at 166 n.13 (quoting Press Release, United States White House (May 24, 1992)).

111. *See id.* at 166.

112. *See Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

113. 8 U.S.C. § 1231(b)(3)(B)(iii) (1996).

State" from doing that.¹¹⁴ Perhaps because of the looming issues of foreign policy and a resultant reluctance to disturb executive policy, the Court focused on the issue of the extraterritorial nature of our domestic and treaty obligations. Thus, its inquiry was guided by the presumption that "Acts of Congress do not ordinarily apply outside our borders"¹¹⁵

From this premise, the Court repeatedly noted that the statute's reference is to the Attorney General, not the President, the Coast Guard, or some other arm of the federal government.¹¹⁶ Thus, despite the Court's wide-ranging discussion, it was driven by this almost single-minded focus on the Attorney General and her domestic duties. This led it to conclude that all data led "unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens remain in the United States."¹¹⁷ Acknowledging this remarkable and probably non-contemplated act of going off to the high seas and turning people back to places of danger, noting astonishingly that "such actions may even violate the spirit of Article 33,"¹¹⁸ the Court still upheld the government's position that our humanitarian obligations ended at our borders. Perhaps for one of the only times in our legal history, the Court openly shunned the spirit of the law in favor of its notions of linguistic purity and necessity.

Yet this result was compelled by neither the language nor spirit of the law. The Court was construing documents of concededly international scope. Both domestic and international refugee law, by necessity, deal with matters that transcend borders. Thus, the presumption against extraterritoriality "evaporates when a statute that regulates distinctively international subject matter . . . is involved."¹¹⁹ The presumption was simply inapposite. Worse, it was senseless, for the Refugee Act and Protocol bound this country to respect the rights of refugees, foremost among which was the right to be safe from forced repatriation. Thus, the Court's construction of the law totally ignored our obligations as a country to honor these rights. The Act and Protocol bind the United States. The INA refers to the Attorney General because she has the legal authority to apply our immigration law. If she is prohibited from returning a refugee to a place of

114. See Convention, *supra* note 74, Art. 33(1), 189 U.N.T.S. at 176.

115. *Sale*, 509 U.S. at 173.

116. See *id.*

117. *Id.* at 177.

118. *Id.* at 183.

119. Respondent's Brief at 33, *McNary v. Haitian Centers Council*, 969 F.2d 1350 (2d Cir. 1992) (No. 92-344)(Dec. 21, 1992), 1992 WL 541267 (authored by Harold Hongju Koh for the Allard K. Lowenstein Human Rights Project at Yale Law School). Professor Koh went on to explain that the presumption was a "tool of statutory construction which 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id.* at 34-35 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 247 (1992)).

danger, so too are all agents of the government. Surely the President conducts foreign policy, but as Professor Koh said, "ours is a foreign policy conducted under law."¹²⁰

Only Justice Blackmun dissented. By his view, the majority had inverted our domestic and international obligations, reflecting what he later called a "disturbing disregard" on the part of the Court for its obligations when construing international law.¹²¹ Rather than following the presumption against extraterritoriality, Justice Blackmun suggested a different interpretive tack. He suggested that we interpret our domestic law so as not to violate the "law of nations if any other possible construction remains."¹²² The Convention's categorical language should control and no contracting state could return any alien "in any manner whatsoever"¹²³ to a place of grave danger. Blackmun clearly chafed at the Court's having "reasoned backwards to construe the language of Article 33.1 — a global convention — in light of its interpretation of American immigration law."¹²⁴ Blackmun would have given primacy to international law, recognizing that it represented a distillation of decades of worldwide experience in humanitarian law, so that it should trump any domestic law with which it conflicts.

Professor Koh's position was even simpler. Though linguistic indeterminacy swirled about the case, some things were clear. Koh urged on the Court one fundamental, guiding notion, one that would dissolve any linguistic difficulties: the "core purpose" of § 243(h) was "to embed into United States law our humanitarian international obligation not to deliver fleeing refugees into the hands of their persecutors."¹²⁵ Had the Court followed that simple notion, had it taken seriously its role in the international community, it would have had the courage to repudiate the interdiction policy as violating domestic and international law. Failing to do so, it retreated further into a kind of legal isolation from the international community.

Sale is surely wrong, but depicts a surreal picture. There is a hazy indistinctness to the claims of faceless people at sea. They have no identities, names,

120. *Id.* at 9.

121. See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994).

122. 509 U.S. at 207 (Blackmun J., dissenting) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–118 (1804)).

123. Convention, *supra* note 74, Art 33(1), 189 U.N.T.S. at 176.

124. Blackmun, *supra* note 121, at 43. Similarly, Professor Louis Henkin characterized *Sale* as an "eccentric, highly implausible interpretation of a treaty." He asked, "is it not time for the U.S. Supreme Court to think afresh about its role in determining and applying international law and obligations, and to assure that they are faithfully complied with?" Louis Henkin, *Notes from the President*, AM. SOC'Y OF INT'L LAW NEWSLETTER, (American Society of International Law, Washington, D.C.) Sept.–Oct. 1993.

125. Respondent's brief at 13–14, *supra* note 119.

or personal stories of actual persecution. Moreover, the Court was responding to what many regarded as a crisis, in which those who set sail faced enormous risks at sea and the President had spoken to the issue. The Court's next encounter with withholding was very different. Contrasting vividly, this case presents all the themes discussed here. *Chevron* and *Charming Betsy* are in unmistakable conflict, as the Court struggled unsuccessfully to align domestic law with international norms.

C. *INS v. Aguirre-Aguirre*¹²⁶ & *Chevron* Implications

Juan Anibal Aguirre-Aguirre fled his native Guatemala and entered the United States without inspection.¹²⁷ Facing deportation in 1984, he sought asylum and withholding of deportation. At a hearing before an Immigration Judge, he testified that he had been politically active with a student group called *Estudiante Sindicato* (ES) with the National Central Union political party from 1989 to 1992. Apparently Aguirre, with other students, protested government policies and actions by setting buses afire after having removed their occupants. These actions were in protest to threats, mysterious deaths and disappearances of activists, and the raising of student fares to apparently unconscionable levels.

The Immigration Judge found Aguirre "a credible witness worthy of belief."¹²⁸ He granted Aguirre's request for both asylum and withholding. Though the INS argued that Aguirre was a terrorist, the judge found that no one was hurt and Aguirre's acts were politically motivated.¹²⁹ Indeed, addressing those arguments he said, "Guatemala is a very violent country with a long history of cruelty, civil strife and human rights violations by the government, by right wing government support groups, and by the guerillas. His activities and those of his fellow students must be viewed in this perspective."¹³⁰ Aguirre had clearly engaged in protest, but had not been convicted of anything in Guatemala. His individual involvement in these activities had not been established except in the most general terms from his testimony.¹³¹ Moreover, the Immigration Judge who heard that testimony found him worthy of these two forms of protection,

126. 526 U.S. 415, 421 (1999).

127. *See id.* at 421.

128. Administrative Record in *Aguirre-Aguirre* at 51 (reproduced in Respondent's Brief in *Immigration and Naturalization Service v. Aguirre-Aguirre* at 7, 1999 WL 26721 (No. 97-1754) (Jan. 21, 1999)).

129. *See id.* at 54.

130. *Id.* at 54-55.

131. This is no trivial concern, for criminal liability turns on the fusion of the guilty act along with the requisite mental state for a particular offense. Absent some sense of just what crime he might have committed based on those elements, the existence and level of his criminal liability are entirely uncertain.

having explicitly concluded that he faced a clear probability of persecution in Guatemala.

The INS appealed this decision to the Board of Immigration Appeals, focusing on essentially one issue. Both the INA and the Convention deny humanitarian relief under some narrowly drawn exceptions. Here, the issue was whether there were "serious reasons" for considering that he had committed "a serious nonpolitical crime outside the United States"¹³² prior to his arrival here. In an unpublished opinion, the Board reversed the Immigration Judge. Addressing the nonpolitical crime exception, it said:

We also find that the criminal nature of the respondent's acts outweigh their political nature. The respondent testified that the primary source of their displeasure from the government arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares. The ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes violent enough to attract the attention of the main combatants in the Guatemalan conflict. Consequently, we find that the respondent is barred from withholding of deportation and do not need to address the issue of his statutory eligibility for this relief.¹³³

Thus, without any specific findings of fact about Aguirre's personal wrongdoing, the Board, in that single paragraph, decried the actions of the students, apparently ascribing equal blame to one and all.

What is missing there remains telling. Guilt is personal, yet there is nothing concrete mentioned about what Aguirre did. Similarly, there is no mention of what crimes he committed and the penalties provided under Guatemalan law. There is no weighing of his political objectives against his criminal conduct, except for the conclusion stated that his crimes outweighed them and, at that, his behavior was conflated with that of the ES.¹³⁴ Finally, there is no reference at all to the Convention, or to any interpretations of its exclusion clauses. Instead, the Board quoted § 243(h)¹³⁵ and the *McMullen* case.¹³⁶ The paragraph quoted pro-

132. 8 U.S.C. § 1231 (b)(3)(B)(iii) (1996). The analogue in the Convention is Art. 1(F)(b).

133. Petitioner's brief in *Immigration and Naturalization Service v. Aguirre-Aguirre*, (No. 97-1754) (Dec. 4, 1998), 1998 WL 858535. Unpublished opinion of the Board included in Appendix B to Petitioner's Brief 12a-18a.).

134. Elsewhere in its opinion, the Board recounted Aguirre's frightening account of his experiences in Guatemala, including letters threatening the ES that members would "disappear" if the protests continued and an apparent threat on his life from the government. *Id.* at 14a-15a.

135. See *supra* note 97 and accompanying text.

136. The Board quoted from *In re McMullen*, 19 I & N Dec. 90, 97-98 (BIA 1984). Its opinion

vides the entirety of the Board's examination of whether Aguirre, whom the Immigration Judge concluded was a refugee, should nevertheless be denied refugee protection because of his criminal conduct.

The Ninth Circuit court of appeals reversed.¹³⁷ Relying heavily on the UNHCR Handbook, it concluded that the Board erred in three respects. It failed to follow Ninth Circuit precedent, did not consider the persecution Aguirre might face if returned to Guatemala, and did not properly weigh the character of Aguirre's crimes in relation to his political objectives.¹³⁸ Reading the exclusion clauses very narrowly, it concluded that one such as Aguirre should be excluded for his crimes only "for the most serious reasons."¹³⁹

Judge Kleinfeld filed an angry dissent. Feeling that asylum law should not provide refuge for "violent criminals," he felt this country should be a "haven for innocent people fleeing persecution," not a "haven for thugs."¹⁴⁰ Appalled by the uncontrolled nature of these student activities, he showed a clear disgust at the majority's view. Thus, never citing to the Handbook or any similar source, he lambasted the majority, concluding that the Board reasonably concluded that "Aguirre-Aguirre's crimes were disproportionate to his political objectives."¹⁴¹

This is a human rights case. Its facts seem distant and hazy, but the death threats to Aguirre do not. We must not lose sight of the gravity of Aguirre's situation simply because of the difficulty of grasping or relating to the dreadful political climate in Guatemala. During the years of his protest activities, Guatemala had one of the worst records in the world for gross human rights abuses.¹⁴² It had the third highest incidence of "disappearances" among the nineteen countries in which they were common,¹⁴³ and political upheavals were responsible for the deaths of 100,000 civilians and the disappearance of 40,000 others during the same period.¹⁴⁴ Indeed, though protesting rising bus fares may seem trivial to us, the student protest against the 100% hike in 1990 was met with violent governmental suppression.¹⁴⁵ Government and the private sector could not be

there said that withholding could be denied if the "crime is grossly out of proportion to the political objective." *Id.*

137. See *Aguirre-Aguirre v. INS*, 121 F.3d 521 (9th Cir. 1997).

138. See *id.* at 523.

139. *Id.* at 524 (quoting from GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 107 (2d ed. 1996)).

140. *Id.* at 526 (Kleinfeld J., dissenting).

141. *Id.* at 525.

142. See TOM BARRY, *INSIDE GUATEMALA* 32 (1992).

143. *Id.* This information was reported by the United Nations Working Group on Forced or Involuntary Disappearances.

144. See *id.*

145. See Brief of Massachusetts Law Reform Commission at 18, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (No. 97-1754).

neatly separated. This is simply part of the backdrop to this case, one easily overlooked in the distant locale and culture of this country.

Compounding Aguirre's dilemma, his attorney did not file a brief with the Board, thus compromising his representation. The Board's action did not reflect the full representation of counsel that one would hope for in a case of such obvious magnitude. On this record, and in view of the remarkable and almost inconceivable nature of the facts, the case proceeded to the Supreme Court.

The Court's opinion in *Aguirre* represents a convergence of all themes mentioned here. It said nothing about the purpose of the exclusion clauses, scarcely addressed the language itself and, in what is effectively a death penalty case, chided Aguirre for his attorney's failure to file a brief with the Board.¹⁴⁶ It did not simply fail to recognize the gravity of the case; it trivialized it in the most dismal fashion. And, worse, its domestication of human rights law reflected a deepening legal isolationism and near contempt for international norms.

The Court faced a clear methodological choice. It could rubberstamp the Board through the use of *Chevron* or it could repeat its approach of *Cardoza-Fonseca* by dealing with world opinion and scholarly commentary. *Charming Betsy* is significant not simply because it compels an adherence to definitive international norms, but because the very recognition of that concept reflects a willingness to grasp the magnitude of the issues regarding the Court's position in the international legal community. The Court's failure even to cite that case was enormously significant.

The opinion broke rather evenly into two parts. Acknowledging our adherence to the Protocol,¹⁴⁷ the Court discussed our Refugee Act as well as the Convention. It parsed both the domestic and international components of this case. Its discussion of the Handbook reflects its rejection of international guidance and *Cardoza-Fonseca* itself. In that case, it rejected administrative practice. Commenting on the importance of the Handbook, it said "the Handbook provides *significant* guidance in construing the Protocol, to which Congress sought to conform."¹⁴⁸ Yet, in *Aguirre*, the Handbook only provided "*some*" guidance.¹⁴⁹ A clear sign of the mood of the Court, this language signaled the course

146. "He failed to submit a brief on the causal link or any other issue to the BIA, and the decision of the Immigration Judge does not address the point. *In these circumstances, the rather cursory nature of the BIA's discussion does not warrant reversal.*" 526 U.S. at 432 (emphasis added). Elsewhere, the Court noted "[r]espondent did not file a brief with the BIA, although his request for an extension of time to do so was granted." *Id.* at 422.

147. *See id.* at 427.

148. 480 U.S. at 439 (emphasis added). Though the Handbook is not binding on members of the international community, it has been followed extensively and the Court's endorsement of it is fairly typical.

149 Citing to *Cardoza-Fonseca*, the Court said "[w]e agree the U.N. Handbook provides some

of the opinion.

The Handbook is quite detailed about the exclusion clauses. The purpose of the exclusion is to "protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime."¹⁵⁰ To achieve that end, the Handbook recommended an examination of the political nature of the offense¹⁵¹ and a balancing of that offense against the danger facing the applicant.¹⁵² Thus, "if a person has a well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him."¹⁵³ According to the UNHCR brief in *Aguirre*, the exclusion clauses are narrow in order to achieve the "core purpose of the Convention . . . to safeguard the rights of vulnerable individuals who, by virtue of the grave consequences that might await them in their homelands, are in need and deserving of international protection."¹⁵⁴

Dismissing the Handbook as not binding on domestic law,¹⁵⁵ the Court relied neither on it nor on scholarly commentary to determine the scope of the exclusion clauses. Instead, it viewed the language through the prism of the Board's opinion, concluding that it comported with the plain meaning of those clauses. First, it rejected the view that the Board should have weighed the gravity of the offenses against the potential persecution *Aguirre* faced. By its reasoning, "it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country."¹⁵⁶ That might be true based on the bare language, but the purpose of the clauses indicates otherwise.

guidance in construing the provisions added to the INA by the Refugee Act." *Aguirre*, 526 U.S. at 427.

150. Handbook, *supra* note 92, at paragraph 151.

151. See *id.* at paragraph 152 ("The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective.").

152. See *id.* at paragraph 156. ("In applying this exclusion clause, it is also necessary to strike balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared.").

153. *Id.*

154. Brief of Amici Curiae Office of the United Nations High Commissioner For Refugees at 5, *INS v. Aguirre-Aguirre*, 1999 WL 33437 (Jan. 21, 1999) (No. 97-1754). Scholarly commentators uniformly agree. According to Grahl-Madsen, the exclusion clauses serve two purposes: to prevent granting refugee status to people who might jeopardize the internal security of asylum countries and to prevent the abuse of this status by fugitives to justice. See A. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 290 (1966). Similarly, according to James Hathaway, "because these clauses are to be applied only in relation to persons who otherwise present a *prima facie* need for protection, they ought reasonably to be strictly construed." JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 189 (1991).

155. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999).

156. *Id.* at 426.

In *Pushpanathan v. Canada*,¹⁵⁷ the Supreme Court of Canada adopted a radically different approach. There, it considered the excludability of a drug trafficker under another, related, exclusion clause.¹⁵⁸ It also faced an adverse administrative determination, but concluded that the “starting point of the interpretative exercise is, first, to define the purpose of the Convention as a whole, and, second, the purpose and place of Article 1F(c) within that scheme.”¹⁵⁹ That Court determined that the exclusion clauses should be interpreted very narrowly. Since the “denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention . . . [it] can only be justified where the protection of those rights is furthered by the exclusion.”¹⁶⁰ Accordingly, that Court found the appellant’s conspiracy to traffic in narcotics did not warrant the application of the exclusion clause.¹⁶¹

Our Court, instead, dealt with the Handbook as if it were some hostile item. Never discussing the purpose of the Convention or exclusion clauses, it still concluded that the “BIA’s determination that § 1253(h)(2)(C) requires no additional balancing of the risk of persecution rests on a fair and permissible reading of the statute.”¹⁶² Yet the practice of the international community is clear and uniform. The UNHCR brief in this case argued that balancing is required since the Handbook position represents more than four decades of State practice.¹⁶³ And, that practice was recently reaffirmed by the 15 member States of the European Union, who issued an official statement saying, “[t]he severity of the expected persecution is to be weighed against the nature of the criminal offense.”¹⁶⁴ By the terms of the Vienna Convention, that practice simply must be

157. [1998] 1 S.C.R. 982.

158. Art. 1F(c) excludes from humanitarian coverage anyone who “has been guilty of acts contrary to the purposes and principles of the United Nations.” See Geneva Convention, *supra* note 75.

159. 1 S.C.R. at 1022.

160. *Id.* at 1035.

161. See *id.* at 1036.

162. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 428 (1999).

163. See UNHCR Brief, *supra* note 155, at 20 (indicating that the balancing test “reflects the common understanding of States regarding the application of that provision over a span of more than four decades after the effective date of the Convention”). *Id.* That the UNHCR is authoritative is unquestioned. In a recent British case, the court was highly deferential to a letter written from a UNHCR Deputy Representative to Britain to appellant. It said that though the letter can be no more than “persuasive” it did “represent the distillation of the collective wisdom of the Commission which has been concerned with supervising the operation of the Convention on a world wide basis since it first came into effect.” *Danian v. Secretary of the Home Dep’t.*, Supreme Court of Judicature in the Court of Appeal, [2000] IMM AR 96 (Eng. C.A. 1999). The court gave the letter great, even determinative weight.

164. *Council of the European Union’s Joint Position on the Harmonized Application of the definition of the Term ‘Refugee,’* at 13, E.U. Doc. No 96/196/JHA (1996) available at: http://europa.eu.int/eur-lex/en/lif/dat/1996/en_396F0196.html.

recognized.¹⁶⁵

The Court next rejected the Handbook requirement that there should be a causal link between the crime and political purpose.¹⁶⁶ Though the Board purported to weigh his political objectives against the severity of his crimes, the Ninth Circuit found error in its failure to analyze this requirement of examining this causal nexus in determining what drove the applicant's actions.¹⁶⁷ By its view, an analysis of this causal link was a component of the overall analysis because one cannot coherently talk about weighing the crime against its political objectives without examining those objectives. Since the task is to determine the dangerousness of the offender, presumably, the political rather than personal motive of the applicant is most relevant.¹⁶⁸

The Court disagreed. Though admitting that the Board's analysis was "brief," even "cursory,"¹⁶⁹ it noted that Aguirre had failed to submit a brief on this point and concluded that the Board's discussion did not warrant reversal.¹⁷⁰ The Court virtually found that Aguirre had waived this issue, again emphatically

165. Article 31 of the Vienna Convention provides that in interpreting a treaty "there shall be taken into account . . . (b) any subsequent practice in the application of the treaty . . ." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969). The UNHCR brief also points out that the Court itself has ruled that "the practice of signatories to a treaty 'cannot be ignored' when construing its meaning." UNHCR brief, *supra* note 154, at 20 (citing to *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984)).

166. Paragraph 152 of the Handbook requires that "[t]here should also be a close and direct causal link between the crime committed and its alleged political purpose and object." Handbook, *supra* note 93. Yet, the Court in *Aguirre* said that "[w]hatever independent relevance a causal link inquiry might have in another case, in this case the BIA determined respondent's acts were not political based on the lack of proportion with his objectives. It was not required to do more." 526 U.S. at 432.

167. *See Aguirre-Aguirre v. INS*, 121 F.3d at 523-24 (9th Cir. 1987).

168. The Ninth Circuit concluded that his political purpose was to challenge a government that had murdered its own citizens. By its analysis, in weighing Aguirre's degree of wrongdoing, the Board should have considered this balance then between his political and personal motives. It went on to say, somewhat colorfully, that:

[w]hen you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet. When you are dealing with a government which is an accomplice or an accessory to terroristic methods of government, you need to use forceful measures to draw the government's attention to your protest; your political objective is a governmental response, you look for a sensitive area.

Id. Thus, if the purpose of the exclusion clause is to protect the receiving country from the danger posed by serious criminals, the political motive of applicants has a substantial bearing on whether they should be characterized as more as political actors than, as Judge Kleinfeld said, "thug[s]." *Id.* at 526.

169. *INS v. Aguirre-Aguirre*, 526 U.S. at 415, 432 (1999).

170. *See id.*

breaking ranks with its international counterparts.

The Ninth Circuit urged a sophisticated approach to the exclusion clauses. It faulted the Board for its cursory analysis, but its insistence that the weighing test be supplemented by "examining additional factors"¹⁷¹ prompted some of the Court's harshest criticism. It was here that *Chevron* took center stage and the Court's analysis of the issues was most parochial.

Chevron involved a construction by the EPA of the requirements of the Clean Air Act Amendments of 1977.¹⁷² This case was before the Supreme Court because the Circuit Court disagreed with the EPA. The Court recognized the inherent incompleteness of statutes, thereby acknowledging the need for the administrative system to interpret statutes in the exercise of its delegated authority. It then generated a two-step test to be used in the review of agency interpretations. If Congress has spoken directly to an issue and its intent is clear, that view must be followed. If, however, it has been silent or ambiguous, the agency's view must be upheld so long as it represents a "permissible construction of the statute."¹⁷³ This test reflects both an acknowledgment of agency expertise and the appropriateness for the Executive branch of government to make such policy choices.¹⁷⁴

It is unclear, though, exactly what the Board did in *Aguirre*. Certainly, unlike the EPA, it did not fill in substance to the open texture of a statute. The Board reiterated its view in *McMullen*¹⁷⁵ and briefly analyzed the facts of the case. Thus, in an unpublished, non-precedent decision,¹⁷⁶ the Board simply de-

171. *Id.* at 424.

172. *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

173. *Id.* at 843.

174. *See id.* at 865-66. The Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id.

175. "We have held that '[i]n evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective . . .'" INS Brief, *supra* note 133, at 17-a (citing to *In re McMullen*, 19 I & N Dec 90, 97-98 (1984)).

176. *See supra* note 68. The Board designates certain important decisions as precedent decision through a largely informal process.

cided a case. It lent no new interpretation to the Refugee Act and did not even mention the Convention. Perhaps that was why the Ninth Circuit reviewed its decision *de novo*.¹⁷⁷ The Court emphatically reversed the Ninth Circuit on the construction of the withholding exclusion clause.¹⁷⁸

Here the *Chevron* deference was most extreme. First, the Court commented on the Ninth Circuit's failure to defer to the Board, criticizing it for failing to apply the *Chevron* test. Stating that "principles of *Chevron* deference are applicable to this statutory scheme,"¹⁷⁹ it concluded that the Ninth Circuit erred by failing to follow those principles.¹⁸⁰

The Court, rather remarkably, next fortified the notion of *Chevron* deference. It first repeated its views from *Abudu* that deference is "especially appropriate" in the immigration context where officials exercise sensitive political functions.¹⁸¹ Explaining further the reasons for such heightened deference the Court said:

A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.¹⁸²

Chevron plainly acknowledged the attenuated political responsiveness of members of agencies.¹⁸³ It nevertheless called for deference because agencies were at least indirectly answerable to the Chief Executive.¹⁸⁴ But this has simply gone too far. The members of the Board do not, and must not, play any role in the formulation of foreign policy. They are administrative law judges whose function is to decide immigration appeals. Their job, in the language of Ronald Dworkin, is to decide cases on principle, not to formulate foreign policy in the guise of deciding cases.¹⁸⁵

177. See *Aguirre*, 121 F.3d at 523.

178. See *Aguirre*, 526 U.S. at 424.

179. *Id.*

180. See *id.* at 425.

181. See *id.* The oddity of that view has already been examined in this article's PART I discussion of *Abudu*.

182. *Id.*

183. *Chevron*, 467 U.S. 837 (1984).

184. *Id.* at 865-66.

185. Much of Dworkin's work is based on this dichotomy. See, e.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975). Dworkin insisted there, as he has since, that "[p]olicy decisions must therefore be made through the operation of some political process de-

Doherty concerned the actions of two Attorneys General while *Sale* concerned a conflict in the implementation of an Executive Order of the President. In *Aguirre*, by contrast, the Court dealt with an unpublished, opaque opinion of a Board panel that was not even selected for precedent status. Political accountability was so low that the signature line of the Board opinion in Petitioner's brief says "signature illegible."¹⁸⁶

Plainly, at times *Chevron* fits poorly in the modern administrative state, at least in immigration law. At its core, the Court's deference is based only on the Board being within the Executive branch of government. Yet *Chevron* does not create an administrative monolith. The same level of deference need not be afforded to all members of this administrative community in all circumstances. Deference should be highest when agencies demonstrate serious focus on the issues. Had this been a published, precedent decision of the entire Board, it should have commanded more respect. Had it been evident that the Board, indeed, did its job carefully, deference would have been more appropriate.¹⁸⁷ However, when an agency shows so little care in its work product as did the Board here, the rationale for deference begins to dissolve. The complete failure of the Board to even mention the Handbook, let alone discuss or weigh the interests of the international community, evidences the poverty of its work product.

The Canadian Supreme Court's opinion in *Pushpanathan* contrasts dramatically with *Aguirre*. Guided by a sense of the gravity of the moment and the purpose of the exclusion clauses, that Court recognized the limitations of the administrative state in the human rights area. Rejecting a highly deferential

signed to produce an accurate expression of the different interests that should be taken into account." *Id.* at 1061.

186. Petitioner's brief in *INS v. Aguirre-Aguirre*, *supra* note 133, at 18a.

187. Circuit courts have a long history of requiring that the Board does its job before deference is owed. In the wake of *Wang*, for example, many courts imposed procedural requirements upon the Board. *See, e.g.,* *Ravancho v. INS*, 658 F.2d 169 (3d Cir. 1981) (requiring the Board to consider the totality of the circumstances regarding hardship); *Jara-Navarrette v. INS*, 813 F.2d 1340, 1342 (9th Cir. 1986) (criticizing the Board's "cursory and generalized analysis" of the potential harm to the U.S. citizen children). In a recent opinion from the Second Circuit, Judge Calabresi addressed this issue. There, the court was reviewing the Board's interpretation of the term "moral turpitude." The court generally concluded that deference was owed to its interpretation of immigration laws. Writing separately, Judge Calabresi said that:

[U]nder *Chevron*, we may defer to an agency interpretation only if the agency has adequately explained its rationale and the factual basis for its decision Our inquiry should be more searching . . . and, at the least, in order to find that the agency's [sic] construction is reasonable, we should be able to point to evidence that it considered the matter in a detailed and reasoned fashion.

Michel v. INS, 206 F.3d 253, 268 (2d Cir. 2000) (Calabresi, J., dissenting) (citations omitted).

standard for the judicial review of board decisions, it established one of correctness. It did so because "the Board's expertise in matters relating to human rights is far less developed than that of human rights tribunals."¹⁸⁸ Finding little relationship between the Board's area of expertise and the exclusion clauses, the Court adopted this strikingly non-deferential standard of correctness. Our U.S. Supreme Court should follow this view, and construct a new relationship between *Charming Betsy* and *Chevron* that strikes a balance between deference and a recognition of its obligation to acknowledge and enforce international norms.

IV. CONCLUSION

These cases decided by the United States Supreme Court are disturbing. In each, the aliens won in the Circuit Court. In each, the appellate court engaged in reasoned analysis, regarding the issues contextually so that language was subordinated to purpose. Rather than regarding statutes as "a series of ad hoc deals," the courts recognized and vindicated the values for which they stood.¹⁸⁹ Yet in each, the Court not only undid these rational results, but also entirely shunned even the notion of statutory purpose in the process.

Statutory purpose should not be confused with legislative intent. For years, Justice Scalia has inveighed, quite correctly, against the use of legislative history to interpret statutes.¹⁹⁰ A legislature cannot "intend" some meaning, for it is made up of myriad subgroups, and documents such as committee reports only represent the anonymous thinking of those subgroups. Purpose is different and inheres in the very notion of a statute.

Hart and Sacks pointed out that the search for statutory purpose is no Utopian notion in which some "well-wisher" engages in an arcane process of divination. Rather, it is quite straightforward. Citing to the famous Sixteenth Century Heydon's Case,¹⁹¹ they developed a remarkably simple approach to the

188. *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, at paragraph 47.

189. See William N. Eskridge, Jr., *Public Value in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1036 (1989). Professor Eskridge pointed out that "statutes embody some overall policy rationality." *Id.* By his thinking, then, the interpretation of statutes should involve discerning the internal coherence of various provisions of a statute, fitting a statute coherently within a group of related laws and assuring that the statute develops coherently over time.

190. From his days on the D.C. Circuit, Justice Scalia has maintained this attack on intentionalism. See generally *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia J., concurring.) As Eskridge and Frickey put it, "[c]ommittee members and bill sponsors are not necessarily representative of the entire Congress, and so it is not necessarily accurate to attribute their statements to the whole body." Eskridge & Frickey, *supra* note 9, at 327. Moreover, they go on to criticize any approach that gives weight to the view of a legislative subgroup.

191. See *Heydon's Case*, Exchequer, 76 Eng. Rep. 637 (1584) (reprinted in HENRY M. HART, JR.

task. As that nugget points out, an analysis should begin with an examination of the preexisting law to determine the "mischief and defect for which the common law did not provide."¹⁹² Then, the task was to determine what Parliament's remedy was for this problem.

This translates easily today. At the Board level, there is the opportunity to keep constant oversight over statutes so that these interpretations keep pace with domestic and international developments. Though the Board has enjoyed some success here,¹⁹³ failures such as *Aguirre* are troubling. At the same time, judicial review exists to correct such failures. Even though the Court followed blindly in *Aguirre*, hopefully, with the addition of members to the Board and the resultant broadening of its perspective, it can fulfill the promise Eskridge and Frickey foresaw for agencies under *Chevron*.¹⁹⁴

The problems for the Court are serious. Having embarked on an approach that even Justice Stevens admitted might eviscerate the spirit of the law,¹⁹⁵ the Court has built a body of precedent unlikely to be undone easily. It has lost its way as a major court in the international community. In rejecting purpose, renouncing the spirit of the law in favor of slavish deference and linguistic myopia, the Court has done a terrible disservice to human rights and the orderly and humane development of the law.

Much has been lost as a result of the Court's decisions. The litigants have suffered losses, as has the law. But perhaps an even greater loss is to judicial review itself. The Judiciary and Executive are not locked in some conflict in which either courts must defer readily or be accused of usurping executive function. Rather, they can and should engage in a dialogic process through which they work together to further the development of the law. If, as in *Aguirre*, the Executive branch does not do its job, it should be reversed and learn as a result. It should be encouraged to engage in careful consideration of very serious questions, and lazy efforts such as those in *Aguirre* should result in reversal.

The last few decades have seen an explosion of scholarly discussion of

& ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1111 (William Eskridge, Jr. & Phillip Frickey eds., 1994)).

192. *Id.*

193. For example, *In re Kasinga*, 21 I & N Dec. 357 (BIA)(en banc 1996) concluded that the prospect of female genital mutilation provided the basis for an asylum claim. Although the majority opinion was somewhat cryptic, several members concurred. Member Rosenberg's opinion was particularly important for the manner in which she brought Kassinga's claim within the concept of gender-based persecution. On a whole, then, the Board was active and responsive to that difficult, though somewhat unconventional claim.

194. See Eskridge & Frickey, *supra* note 9, at 327 (elaborating on agencies and dynamic statutory interpretation).

195. See *supra* note 119 and accompanying text.

statutory interpretation, which has not been limited to academics.¹⁹⁶ Rather, the works of Calabresi,¹⁹⁷ Easterbrook,¹⁹⁸ Posner,¹⁹⁹ Scalia,²⁰⁰ and others have all advanced the cause of interpretation. Strangely, though, much of this robust debate has been lost on the Court. Though Justice Scalia's influence is evident, the Court seems largely oblivious to these developments. The irony is significant and unfortunate. In an area in which we want the Court to be most expert, it is most deficient. Unless it advances with the legal community around it, we will bear continuing witness to the flagging spirit of the law.

196. Surely Ronald Dworkin and others have played a major role in spurring debates. *See, e.g.*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541-43 (1982). Dworkin's idea of interpretation as a "chain novel" created an inspired way of understanding interpretation and dynamic theories of interpretation.

197. *See generally* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

198. *See, e.g.*, Frank Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System* 98 HARV. L. REV. 4, 14-15 (1984).

199. Judge Posner has written extensively on interpretation, much of it during the periods I have been discussing. *See, e.g.*, RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985).

200. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW; AN ESSAY* (1997). Naturally, this is but one example of Justices Scalia's crusade for the plain meaning approach.